93-611

No. 93-

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE CONTINENTAL INSURANCE COMPANY,
Petitioner,

v.

GAYLON D. SIMMONS,
GLORIA ANNETTE TURNER SIMMONS,
and the UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 27A(b) of the Securities Exchange Act of 1934 as amended, 15 U.S.C. § 78aa-1 ("Section 27A(b)"), violates Articles I and III of the Constitution of the United States and the Separation of Powers doctrine because through it the legislative branch has sought to reverse final judgments of the judicial branch.

2. Whether Section 27A(b) violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States by upsetting the property rights litigants have gained in final judgments.

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS AND RELATED CORPORATIONS

The following were parties to the proceedings in the lower courts: *

Gaylon D. Simmons

Gloria Annette Turner Simmons

J. C. Templeton

Joe H. Foy

Harry V. Carlson

Robert Ted Enloe, III

W. A. Griffin

Thomas L. Kister

Leonard Leon

Edward T. Cothman

Bracewell and Patterson

BDO Seidman

The Continental Insurance Company
(successor to Harbor Insurance Company)

William M. Templeton

United States of America

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* TGX Corporation appeared in the style of the court below, but was not a party to the proceeding in the United States Court of Appeals for the Fifth Circuit. The Continental Insurance Company is a corporation whose parent company is the Continental Corporation. Any and all subsidiaries of Petitioner are wholly owned, and it is the successor in interest to the Harbor Insurance Company by virtue of an assignment and assumption of rights agreement whereby Continental undertook all obligations of Harbor under the TGX policy. Although named as a defendant in this case, Greenwich Insurance Company merely purchased certain tradenames and licenses of Harbor, and at no time did Greenwich have, nor does it currently have, any interest in, or obligation to, a person or entity in connection with the TGX policy.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner The Continental Insurance Company, successor to Harbor Insurance Company, respectfully petitions this Court for a writ of *certiorari* to review a decision of the United States Court of Appeals for the Fifth Circuit, reversing the judgments of two separate district courts finding Section 27A(b) of the Securities Exchange Act of 1934 as amended ("the 1934 Act"), 15 U.S.C. § 78aa-1, unconstitutional.

OPINIONS AND ORDERS BELOW

The July 20, 1993 opinion of the United States Court of Appeals for the Fifth Circuit is reported *sub nom. Pacific Mutual Life Insurance Co. v. First RepublicBank Corp.* at 997 F.2d 39 (5th Cir. 1993) and is reproduced

in Appendix A, p. 1a.[1] The August 25, 1993 order of the Fifth Circuit denying the petition for rehearing is unreported, but is reproduced in Appendix B, p. 34a.

The initial decision of the United States District Court for the Eastern District of Louisiana is reported at 786 F. Supp. 587 (E.D. 1992) and is reproduced in Appendix E, p. 42a. The District Court's March 23, 1992 Final Judgment and Order based on that opinion is reprinted in Appendix D, p. 40a. The District Court's subsequent decision on the motion for new trial (1992 WL 125365 (E.D. La. May 20, 1992)) is unreported, but is reproduced in Appendix C, p. 36a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision on July 20, 1993. That court entered an order, denying a petition for rehearing on August 25, 1993, and this Petition is timely filed. This Court therefore has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, section 1 of the Constitution of the United States provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

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[1] As explained above, the Fifth Circuit reversed the finding of Section 27A(b)'s unconstitutionality of two separate district courts: the Northern District of Texas in *Pacific Mutual Life Insurance Co. v. First RepublicBank Corp.*, 806 F. Supp. 108 (N.D. Tex. 1992), and the Eastern District of Louisiana in the instant case. The cases were decided in a single opinion styled as outlined above.

[2] Petitioner notes that on August 26, 1993, other parties in this case filed a Petition for Writ of Certiorari also seeking review of the Fifth Circuit's ruling. *See BDO Seidman v. Simmons*, 62 U.S.L.W. 3165 (U.S. Aug. 26, 1993) (No. 93-313). Petitioner files this separate petition pursuant to Sup. Ct. R. 12.2.

2. Article III, section 1 of the Constitution of the United States provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

3. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of . . . property, without due process of law . . . .

4. Section 27A of the 1934 Act, 15 U.S.C. § 78aa-1 provides:

> (a) *Effect on pending causes of action*
>
> The limitation period for any private civil action implied under section 78j(b) of this title [*i.e.*, section 10(b) of the Act] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on dismissed causes of action*
>
> Any private civil action implied under section 78j(b) of this title [*i.e.*, section 10(b) of the Act] that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991 [*i.e.*, the date of enactment of the section].

STATEMENT OF THE CASE

A. The Statute of Repose for Rule 10b-5 Claims

On June 20, 1991, this Court held that the private cause of action implied by Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, is subject to the one year from date of discovery, no more than three years from date of transaction period contained in 15 U.S.C. § 78i(e). *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). Moreover, this Court applied the three-year statute of repose to the plaintiffs before it in *Lampf*, dismissing their claims as time-barred. The same day as *Lampf*, this Court decided *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). In *Beam*, this Court held that when a federal law is announced and applied to the parties to the controversy in which it is announced, that law must be given full retroactive effect to all pending cases. In light of *Beam*, the federal courts were required to apply the three-year statute of repose announced in *Lampf* to all pending Rule 10b-5 cases, including this case.

B. Dismissal of the 10b-5 Claims Based on *Lampf* and *Beam*

In March 1990, Gaylon and Gloria Simmons (collectively "Simmons") filed suit alleging Rule 10b-5 claims against directors of TGX Corporation and its law and accounting firms.[3] In June 1991, Simmons added as a defendant Greenwich Insurance Company based on a policy of insurance Harbor Insurance Company allegedly issued to TGX and its directors and officers.[4] All de-

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[3] Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1391 and 15 U.S.C. §§ 77v, 78aa and pursuant to the court's pendent jurisdiction.

[4] As explained above, Petitioner The Continental Insurance Company is the successor in interest to Harbor Insurance Company and undertook all obligations of Harbor under the TGX policy. Conversely, Greenwich Insurance Company has no interest in or obligation in connection with the TGX policy.

fendants to the Simmons' suit will be collectively referred to as the "TGX defendants."

Following this Court's decision in *Lampf*, the TGX defendants filed dispositive motions. On August 5, 1991, the District Court entered a Judgment and Order dismissing the Simmons' Rule 10b-5 claims against the TGX defendants as "time-barred." Appendix J, p. 78a.[5] This August 5, 1991 judgment dismissing the Simmons' Rule 10-b claims was never appealed and became final on September 4, 1991.

C. Congress' Response: Too Little, Too Late

In response to *Lampf* and *Beam*, on November 27, 1991, Congress passed S. 543, a bill which amends the 1934 Act by adding a Section 27A, 15 U.S.C. § 78aa-1 ("Section 27A"). On December 19, 1991, Section 27A was signed by the President. It provides in pertinent part that

> (b) *Effect on dismissed causes of action*
>
> Any private civil action implied under section 78j(b) of this title [*i.e.*, section 10(b) of the Act] that was commenced on or before June 19, 1991—

[5] Undaunted, the Simmons again attempted to assert Rule 10b-5 claims against the TGX defendants by filing a Fifth Amended Counterclaim to a 1987 contract suit filed against the Simmons by TGX which had been stayed since TGX filed for bankruptcy protection in 1990. On August 22, 1991, the magistrate allowed the filing of the amended counterclaim on a "procedural basis" only, but deferred to the District Court as to the effect of the "statute of repose" announced in *Lampf*. Appendix I, p. 77a. The District Court again held that the Simmons' Rule 10b-5 claims against the TGX defendants were time-barred under *Lampf* and did not relate back to their previously filed counterclaims. Appendix H, p. 60a; Appendix G, p. 58a. On October 17, 1991, the District Court entered a judgment dismissing the Simmons' Rule 10b-5 claims asserted in the amended counterclaim. Appendix F, p. 56a. This judgment too was not appealed and became final on November 16, 1991. Moreover, the Fifth Amended Counterclaim is irrelevant to the issues before this Court because Simmons moved to reinstate his Rule 10b-5 claims under the 1990 suit only.

> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991 [*i.e.*, the date of enactment of the section].

Thus Congress passed a statute which allowed the statute of repose announced in *Lampf* to stand as to all cases commenced after June 19, 1991, but to prevent application of the *Lampf* statute of repose to cases pending at the time *Lampf* was decided as required by *Beam*. Because Section 27A did not change the *Lampf* statute of repose and because its passage and signing dates were after the time for appeal had run in the instant case, application of Section 27A to the instant case would be unconstitutional.

D. Rulings on the Constitutionality of Section 27A in this Case

On January 6, 1992, more than four months after the judgment of dismissal in this case had become final, the Simmons moved to reinstate their Rule 10b-5 claims under Section 27A. Petitioners objected, alleging among other grounds that Section 27A was unconstitutional. The District Court agreed and refused to reinstate the case, holding that Section 27A violates separation of powers principles and contravenes the Constitution's prohibition of selective prospectivity of legal rules recognized in *Beam*. Appendix E, pp. 48a-55a. In response to the Simmons' motion for new trial and the intervention of the United States, the District Court again refused to reinstate, adding new findings that Section 27A(b) authorized the upset of final judgments in violation of separation of powers principles and the Due Process Clause. Appendix C, pp. 36a-39a.

On appeal, the Fifth Circuit reversed the District Court's holding that Section 27A was unconstitutional in this case and the similar holding of unconstitutionality of Section 27A by the District Court of the Northern District of Texas in a related case.[6] The two cases were then remanded to the District Courts. Appendix A, p. 1a. Subsequent to the Fifth Circuit's opinion in this case, the Sixth Circuit issued an opinion in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), reaching the opposite conclusion.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AND SIXTH CIRCUITS CONFLICT ON THE CONSTITUTIONALITY OF SECTION 27A(b).

The two Circuit Courts of Appeals which have directly considered[7] whether Section 27A(b) is unconstitutional as applied to final non-appealed judgments have split on the result.[8] The Sixth Circuit has found that Section

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[6] *See supra* note 1.

[7] While not directly faced with the issue, two other circuits have implied that Congress does not have authority to alter the statute of limitations or reinstate cases whose judgments of dismissal are "final" and not appealed as opposed to cases that are still "pending." *See Axel Johnson, Inc. v. Arthur Andersen & Co.*, Nos. 346, 92-7624, 1993 WL 279533, at *5-*7 (2d Cir. Sept. 29, 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993).

[8] At least one circuit court judge has found that Section 27A is unconstitutional as it violates the Separation of Powers doctrine established in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575-76 (11th Cir. 1992) (Wellford, J., dissenting), *cert. denied*, No. 92-2061, 62 U.S.L.W. 3237 (U.S. Oct. 4, 1993); *see also id.* at 1575 n.1 (collecting a partial list of district court cases that have determined section 27A to be unconstitutional). Moreover, legal scholars have been debating the constitutionality of Section 27A almost since the moment of its enactment. *See, e.g.*, Anthony M. Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 Tulsa L.J. 23 (1992); Lyman Johnson, *Securities Fraud*

27A(b) is unconstitutional in that context; the Fifth Circuit has upheld its constitutionality. As explained by the Sixth Circuit, the statute is unconstitutional because it upsets the finality of non-appealed judgments thereby violating separation of powers principles:

> [W]here the courts have adjudged a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment and apply the subsequent change in place of the time bar that originally resolved the case, even by giving the new provision retroactive effect. Where a Federal court enters judgment in a case on the basis of a time bar, it confers upon the prevailing party a right based on the protections that the time bar provides. Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.

Plaut, 1 F.3d at 1496; *see also id.* at 1499 ("[I]f Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile . . . ."); *id.* (Section 27A(b) is "an unconstitutional usurpation of the judiciary power.").

This Court should grant *certiorari* to resolve the conflict among the circuit courts as to the constitutionality of Section 27A(b).

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH CONSTITUTIONAL PRINCIPLES OF SEPARATION OF LEGISLATIVE AND JUDICIAL POWERS AND DUE PROCESS.

The Constiution provides a separation of powers among the three branches of government with appropriate checks and balances among them. *See Marbury v. Madison*, 5

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and the Mirage of Repose, 1992 Wis. L. Rev. 607 n.6; Maggi A. Lazarus, Comment, *Life After* Lampf: *The Constitutionality of New Section 27A of the Securities and Exchange Act of 1934*, 68 Tul. L. Rev. (forthcoming Mar. 1994).

U.S. (1 Cranch) 137 (1803). By allowing the Congress to overstep its constitutional boundaries and to act as a "super-appellate" court to reverse final judgments of the judicial branch, the Fifth Circuit has upset the delicate balance secured by the Constitution, thereby conflicting with decisions of this Court since the founding of the Republic. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), Congress enacted a scheme to provide pensions to Revolutionary War veterans. The federal courts were to render judgment as to the validity of an individual's claim for benefits and the amount thereof. However, the Congress gave the executive branch via the Secretary of War the ability to reverse the decisions of the federal courts for "imposition or mistake." Sitting on three separate Federal Circuit Courts, the Justices of the Supreme Court refused to participate in Congress' scheme, stating:

> [B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.
>
> [I]f . . . the court had proceeded, its judgments . . . might, under the same act, have been revised and controled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States.
>
> [N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested . . . .

Id. at 410 n.2.

Thus, in *Hayburn's Case*, this Court held that Congress cannot constitutionally "revers[e], or even suspen[d]" a

final judgment of the judicial branch. In violation of *Hayburn's* teachings regarding separation of powers, in the instant case, the Congress is indeed seeking through Section 27A(b) to reverse the final judgments of the federal courts. Regardless of how laudable Congress believes its action to be, it cannot, consistent with the Constitution, reverse final judgments of the judicial branch.[9] As the Sixth Circuit explained in *Plaut*, "The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792." 1 F.3d at 1493.

This Court has reinforced its holding that the legislature may not upset final judgments in the centuries since *Hayburn's Case*. For example, in *McCullough v. Commonwealth of Virginia*, 172 U.S. 102 (1898), the Court reviewed a Virginia statute, effectively nullifying bonds issued by the Commonwealth which had been previously adjudged by the courts to be fully negotiable. This Court held in pertinent part:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

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[9] Petitioner questions that if the "camel" of Section 27A(b) is allowed to "thrust its nose into the tent of the judicial branch," *Plaut*, 1 F.3d at 1490, where will the congressional usurpation of judicial power end. Could Congress announce new statutes of limitations for all actions which have been dismissed as time-barred since the beginning of the Republic and allow such claims to be reinstated? More tangibly, could the plaintiffs in *Lampf*, whose claims were dismissed by this Court, have reinstated their claims pursuant to Section 27A(b)? Under a literal reading of the statute, they could have done so, thereby showing that Congress is impermissibly overruling judicial decisions as to specific parties.

Id. at 123-24. Besides the separation of powers component,[10] *McCullough* also contains a due process element that Congress cannot take away rights vested by judgment.[11] Section 27A(b) is therefore unconstitutional on two separate grounds: (1) it impermissibly seeks to infringe on the powers of the judiciary in violation of the

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[10] *See also Axel Johnson, Inc. v. Arthur Andersen & Co.*, Nos. 346, 92-7624, 1993 WL 379533, at *5 (2d Cir. Sept. 29, 1993) ("[I]n cases involving congressional interference with federal court judgments, the vested rights doctrine has a separation of powers component which limits congressional review of judicial actions."); *Plaut*, 1 F.3d at 1493 n.12 (noting *McCullough*'s vested rights doctrine's "prominent separation of powers component"); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988) (*McCullough's* vested rights doctrine "protects judicial action from superior legislative review."), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. by Diane K. v. Board of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("[O]nce a court has disposed of a case, Congress may not dictate a different decision."); *Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir.) (Congress might be unable to overturn final judgments without "invad[ing] the judicial power of the United States, which Article III of the Constitution confides to the federal courts exclusively."), *cert. denied*, 113 S. Ct. 179 (1992); *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974) (*McCullough*'s vested rights doctrine protects "the constitutional independence of the judicial branch of government.").

[11] *See, e.g., Axel Johnson, Inc.*, 1993 WL 379533, at *4 ("The 'vested rights' doctrine has a due process component, grounded upon a recognition 'that rights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other [property].'") (quoting *McDaniel*, 855 F.2d at 810); *Central States*, 960 F.2d at 1345 ("A judgment that has become final through exhaustion of all appellate remedies is a property right . . . ."); *Max M. v. New Trier High School Dist. No. 203*, 859 F.2d 1297, 1299 (7th Cir. 1988); *Tonya K.*, 847 F.2d at 1247 ("Once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."); *Daylo*, 501 F.2d at 816 ("A contrary general rule [to *McCullough*] would subject all judicial action to superior legislative review, a regime obviously inconsistent with due process of law . . . .").

Constitution's separation of powers; and (2) it deprives Petitioner of its property right in a final, non-appealed judgment without due process of law in violation of the Fifth Amendment.

This Court should grant *certiorari* to affirm its decisions that separation of powers principles forbid Congress to reverse final judgments and that Congress may not upset property rights vested by final non-appealed judgments without running afoul of the Due Process Clause.

CONCLUSION

Petitioner respectfully prays that this Court issue a writ of *certiorari* to the Fifth Circuit (1) to resolve the clear conflict between the Fifth and Sixth Circuits as to the constitutionality of applying Section 27A(b) to final, non-appealed judgments and (2) to decide fundamental and important questions of federalism regarding the separation of powers between the legislative and judicial branch and due process issues regarding taking property vested by final judgment.

Respectfully submitted,

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